BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

Opinions Below.

The opinion and interlocutory order of the Court of Common Pleas of Allegheny County, Pennsylvania, sitting *en banc,* sur statutory demurrer (Dithrich and Richardson, JJ., opinion by Richardson, J.) was made a part of the Record (R., p. 26 a), March 25, 1942. It has not been reported.

The opinion and final order of the Court of Common Pleas of Allegheny County, Pennsylvania, sitting *en banc,* making rule absolute and entering judgment (W. Heber Dithrich, J.) was made part of the Record (R., p. 49 a) July 24, 1942. It has not been reported but adopted the opinion of Judge Richardson.

The opinion of the Supreme Court of Pennsylvania (Chief Justice William I. Schaffer, Justices George W. Maxey, James B. Drew, William B. Linn, Horace Stern, Marion D. Patterson and William M. Parker) written *Per Curiam,* was filed January 5, 1943 (R., p. 54). This opinion is reported in 346 Pa. 115; 29 A. 2nd, 678.

II.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C.A. Section 344). The judgment of the Supreme Court of Pennsylvania was entered January 5, 1943 (R., p. 54), and decided the Federal question here raised. The question is substantial and the determination thereof is necessary for the proper decision of the case.

III.

Statement of the Case.

The material facts, with appropriate page references to the printed Record, are stated in the Petition, *supra,* pages 1 to 3 inclusive. A summary of argument appears in the index. The error assigned in the Court below, in so far as it relates to the applicability of the XIV Amendment to the Constitution of the United States, is intended here to be urged (R., p. 53). This assignment of error was to the final order of the Court of Common Pleas entered by Judge Dithrich on behalf of the Court, which order adopted the former opinion in the same case by Judge Richardson wherein the Federal question was decided (R., p. 35 a). The opinion of the Supreme Court of Pennsylvania decided the Federal question (R., p. 55).

IV.

Argument.

History of the conversion of a "trust company" incorporated under the Act of 1874, P. L. 73, into a "bank and trust company" and the conversion of a "bank" incorporated under the Act of 1876, P. L. 161, into a "bank and trust company."

A trust company was incorporated as a title insurance company under Section 2, Paragraph 19, and Section 29 of the Corporation Act of 1874, P. L. 73, 84, providing for incorporation for the purpose of "the insurance of owners of real estate, mortgages and others interested in real estate from loss by reason of defective titles, liens and encumbrances". By supplementary enabling legislation, (*inter alia,* Acts of May 24, 1881, P. L. 22; May 9, 1889, P. L. 159; May 29, 1895, P. L. 127; June 1, 1907, P. L. 382) additional powers were granted,

among them the powers of a trust company and to receive deposits. The corporation prior to 1923 was then properly classified as a "trust company". However, by Act of May 9, 1923, P. L. 173, entitled, "Extending and enlarging the powers and rights of trust companies and banks organized and incorporated under the laws of the Commonwealth", corporations so organized under the Corporation Act of 1874 were authorized, *inter alia,* to discount notes, etc. Consequently, trust companies subsequent to 1923 also conducted the business of banks of deposit and discount, or, in other words, did a banking business; they possessed all the powers of a bank of deposit and discount. This was decided by Judge Stern when he was a Judge of a Common Pleas Court of Philadelphia County in the case of *Gordon, Secretary of Banking, v. Winneberger,* 16 D. & C. 505, affirmed in 310 Pa. 362. Consequently, after the year 1923 a "trust company" doing a banking business should be classified as a "bank and trust company".

A bank was incorporated under the General Banking Act of May 13, 1876, P. L. 161, as amended by the Act of May 3, 1909, P. L. 412. Banks incorporated under this Act were empowered to do only a banking business and should be termed "banks". However, a bank, providing it "had capital stock at least equal to the capital stock which trust companies" were required to have, could qualify under the Act of 1919, P. L. 1032, add the words "trust company" to its name and thereafter was empowered to act in any "fiduciary capacity in which trust companies organized under the laws of the Commonwealth had authority and were permitted under the laws to act." Consequently, a bank complying with the Act of 1919 became a "bank and trust company".

The status of relevant law in Pennsylvania relating to assessments of stockholders.

The Corporation Act of 1874 did not provide for the stockholders' double liability. A "trust company" and a "bank and trust company" organized under the Act of 1874 have been separately classified by the Pennsylvania Courts from a "bank" organized under the Act of 1876. The Supreme Court of Pennsylvania in 1933, in *Gordon v. Winneberger,* 310 Pa. 362; 165 A. 408, reaffirmed former cases to that effect and also decided that stockholders of a "bank and trust company" under the Act of 1874 were not liable for assessments.

The General Banking Act of 1876 provided for double liability. The Superior Court of Pennsylvania in Harr, Secretary of Banking, v. Boucher, *supra,* held that the stockholders of a "bank" incorporated under the Act of 1876 were liable to assessment.

It was stated by the Supreme Court of Pennsylvania that the assessment possesses "elements of a penalty": Gordon v. Winneberger, *supra,* at 366.

WHEN DETERMINING THE CONSTITUTIONAL VALIDITY OF A STOCKHOLDERS' DOUBLE LIABILITY ASSESSMENT, IS NOT CLASSIFICATION OF A BANK AND TRUST COMPANY INCORPORATED UNDER THE PENNSYLVANIA ACT OF 1876, P. L. 161, INTO A DIFFERENT CATEGORY FROM A BANK AND TRUST COMPANY INCORPORATED UNDER THE PENNSYLVANIA ACT OF 1874, P. L. 73, UNREASONABLE, ARBITRARY, AND OF NO EFFECT BECAUSE THE BASIS SUPPORTING THE CLASSIFICATION HAS BECOME IRRELEVANT OR ARTIFICIAL?

In Gordon v. Winneberger, *supra,* the State Supreme Court classified the banks incorporated under the two acts separately. The *Per Curiam* opinion of the Supreme

Court of Pennsylvania in the case at bar relied upon this case in respect to this question (R., p. 55).

On September 25, 1931, when the Secretary of Banking took possession of the institution in question, both types of corporations termed "bank and trust company" were authorized to conduct substantially the same type of business; the only difference was that a corporation organized under the Act of 1874 had authority to conduct an insurance guaranty business in addition to its banking powers. However, no law obliged the corporation to exercise the insurance guaranty powers it possessed. The minimum capital structure was identical,—see Act of 1919, P. L. 1032. It is apparent that the assessment is to strengthen the capital structure; corporations organized under the Act of 1874 having the right to exercise slightly more powers and having more business hazards than corporations under the Act of 1876 should necessitate the strengthened capital. There is, therefore, no substantial basis in fact for separate classifications and especially so when considering the subject of stockholders' assessments. There must be a substantial basis to support valid classifications: *Atchison, etc., R. Co. v. Matthews* (1898), 174 U. S. 96 at page 98 and at pages 104 and 105. A penalty cannot be inflicted upon one corporation and not upon another unless the penalty can be supported by the peculiarity supporting the classification. Otherwise, it is a discrimination and offends the equal protection clause of the XIV Amendment: *Atchison, Topeka, etc., Railroad v. Matthews, supra,* at 104; *Bayside Fish Flour Co. v. Gentry* (1935), 297 U. S. 421, 429; 80 L. ed. 772, 777; *New York Rapid Transit Corporation v. City of New York* (1937), 303 U. S. 571, 578; 82 L. ed. 1024, 1029.

CANNOT AN ACT OF LEGISLATION, CONSTITUTIONAL WHEN PASSED, DUE TO A SERIES OF SUBSEQUENT EVENTS, BE RENDERED UNCONSTITUTIONAL AND UNENFORCEABLE BECAUSE OF THE PROVISIONS OF SECTION 1 OF THE XIV AMENDMENT?

As is more fully stated on page 5 of the Petition, the Supreme Court of Pennsylvania in this case adopted and applied a rule formulated by the Superior Court that "if an act was constitutional when passed, no passage of time, no series of events could render it an unconstitutional enactment at a later date." While this reasoning may be true as to Article III, Section 7 of the State Constitution because of the sole word "pass" used in said section, it is not true as to the Federal Constitution because the XIV Amendment contains the words "make or enforce" and the words "nor deny". Said construction is contrary to the decision of this Court in Abie State Bank v. Bryan, *supra.*

The series of events rendering the assessment provision of the Act of 1876 violative of the XIV Amendment are the various enabling acts and particularly the passage of the Act of 1923, *supra,* affecting 1874 corporations and the Act of 1919 which was complied with by this 1876 corporation.

IS THE ASSESSMENT MADE IN ACCORDANCE WITH SECTION 5 OF THE PENNSYLVANIA ACT OF 1876, P. L. 161, AS AMENDED, AGAINST THE SHAREHOLDERS OF A BANK AND TRUST COMPANY INCORPORATED UNDER SAID ACT OF 1876, AS AMENDED, AND ACQUIRING TRUST POWERS BY COMPLIANCE WITH THE PENNSYLVANIA ACT OF 1919, P. L. 1032 UNENFORCEABLE BECAUSE IT CONFLICTS WITH THE FIRST SECTION OF THE XIV AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

Section 1 of the XIV Amendment to the United States Constitution reads as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. *No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;* nor shall any State deprive any person of life, liberty or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*" (Italics supplied)

It is reiterated that the series of events altering the enforcement of the assessment is: The Legislature of the Commonwealth of Pennsylvania by various enabling acts and particularly by the Act of 1923, which was enacted subsequent to the incorporation of this bank, has granted to 1874 corporation stockholders, immune from double liability assessment, all the powers, including the right to do a banking business, possessed by 1876 corporation stockholders who are specifically made subject to assessment. The Pittsburgh-American Bank and Trust Company, an 1876 corporation, by complying with the Act of 1919, was obliged to possess at least the minimum capital stock structure of an 1874 corporation. Consequently, the two species of corporations cannot be classified separately when considering the subject of shareholders' liability for double assessment. The assessment has been construed by the State Supreme Court as possessing the elements of a penalty.

The subsequent events, created solely by the Legislature, have rendered the enforcement of the assessment against shareholders of an 1876 bank and trust company unconstitutional under Section 1 of the XIV Amendment to the Federal Constitution because any enforcement thereof would be continuing in effect a law which is now abridging the privileges or immunities of the citizens of